

**LEGAL UPDATE: COVID-19**  
**REMOTE ACCESS TO JUSTICE: VIRTUAL SIGNATURES**



**2 April 2020**

In our third update in our Remote Access to Justice series, Elizabeth England and Tiernan Fitzgibbon of Five Paper update you on the law relating to the virtual signing of witness statements, affidavits, statutory declarations and execution of contracts

**Witness Statements**

1. The civil procedure rules allow for an electronic signature on any document which is required by a rule or practice direction (CPR r.5.3).
  
2. There are some additional matters to keep in mind;
  - The person who provides an electronic signature must print their name underneath that signature (CPR r.5.3(1))
  - The document can be sent to the court electronically if a practice direction provides for that course of action (CPR r.5.5(1))
  - Where a document is filed by email it must not also be sent in hard copy to the court (5BPD.4 para 4.1). If a party were to indicate in a covering email to the court that a hard copy will follow, the court staff are at liberty to delete the email.
  - Where a document filed by email contains a statement of truth, 5BPD.4 para 5.1 applies: the name of the person who has signed the statement of truth must be either be typed underneath the signature, or a facsimile of their signature must be

applied in the document by electronic means. NB para 5.2 that the court may require a party to produce a copy of that document bearing an original signature.

3. It is likely that the court will, in making any further directions, address the manner in which evidence is to be sent to the court and exchanged between the parties.
4. It is important for legal practitioners to remember that when signing electronic documents on behalf of their clients, the normal rules on statements of truth still apply as set out in PD 22 paragraph 3.8 and that such an electronic signature will be taken by the Court as their statement that:
  - (1) That the client on whose behalf he has signed had authorised him to do so;
  - (2) That before signing he had explained to the client that in signing the statement of truth they would be confirming the client's belief that the facts stated in the document were true; and
  - (3) That before signing they had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts.
5. As such, it is advised that even where only slight changes have been made to a document that final sign off should be sought from a client before electronically signing on their behalf in order to avoid any problems down the line.

### **Affidavits**

6. An affidavit requires the person making the affidavit to swear their evidence "before a person" (CPR 32 PD para 9.2).

7. The Law Commission recently applied their mind to whether requirements for documents to be sworn 'before' another person could be done remotely. Their conclusion was negative. The requirement to swear 'before' another person requires a physical presence.
8. There is, however, an interesting first instance decision which appears to support the view that an affidavit is not invalid where it does not bear a signature.
9. In *Haederle v Thomas* [2016] EWHC 3498 (Ch) (Nugee J), the claimant applied to commit a defendant (D) for making a false statement in an affidavit. D resisted that application by arguing that, because the jurat had not been completed and bore no signature, the document did not comply with the requirements set out in Practice Direction 32 (in particular para.5.2), and therefore was not an affidavit. In rejecting that submission the judge held (1) a document which sets out a witness's evidence which they have sworn to be their evidence is technically an affidavit, (2) it is not the case that failure to comply with every requirement in Practice Direction 32 renders a document not an affidavit, (3) in particular, a failure to comply with the jurat requirements in para.5.2 does not mean that a duly sworn document was not an affidavit.
10. Whilst there may be wriggle room to argue that an affidavit need not be signed, the problem remains that an affidavit needs to be sworn in the presence of another person.
11. The way around this problem is for practitioners to seek a direction from the court that evidence be permitted by way of witness statement, which may be electronically signed, in lieu of the requirement for affidavit evidence.

### **Statutory declarations**

12. On 4 September 2019 the Law Commission published findings on their project for the use of electronic signatures in England and Wales. Following the Law Commission report, the Law Society published a practice note which said in relation to statutory declarations that their view was that there was no formal requirement for a declarant to be physically present when making their declaration but it had formed as a custom;
- "it remains the custom for the declarant to be physically present before the solicitor or commissioner of oaths at the time of taking the declaration".*
13. Since a statutory declaration is 'made' and neither 'sworn' nor 'signed', there is scope for remote working. There may be some creative solution required where this is a requirement for counterpart execution.
14. It is also advisable to add additional information to the usual form of statutory declaration to reflect the fact that it was administered remotely.

### **Fees**

15. Account must also be taken of the requirement in s.2 of the Commissioner for Oaths (Fees) Order 1993 which requires that fees "shall" be charged: £5 for taking an affidavit, declaration or affirmation, for each person making the same, and £2 for each exhibit. Any professional attesting a signature should make provision for the fee to be paid electronically.

### **Execution of contracts (including leases)**

16. Following the High Court decision in *R (on the application by Mercury Tax Group and another) v HMRC* [2008] EWHC 2721, a protocol for the virtual execution of contracts has emerged known as the Mercury Signing Protocol.

17. In 2016, the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees produced a practice note on the topic which is highly recommended reading.<sup>1</sup> Essentially, in order for all deeds, contracts and guarantees to be validly entered into by virtual means, it is strongly advised that parties comply with the advice as set out below.

18. The legislative framework for the use of electronic signatures is set out in Regulation (EU) No 910/2014 and also the Electronic Communications Act 2000. However, these provisions only go towards the admissibility of electronic signatures and not their essential validity. That is determined by the common law relating to signatures.

19. Where documents are required to be in writing and/or signed and/or under hand, electronically executed documents will satisfy those requirements:

- **Writing:** the Interpretation Act 1978 defines writing as including “typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form” and so electronic documents satisfy this requirement.
- **Signature:** the test for determining whether or not something is a signature is whether the mark was inserted in order to give, and with the intention of giving, authenticity to it. *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265 is authority that an electronic signature has the same legal status as a wet ink signature.
- **Under hand:** a document is generally understood to have been executed under hand if it has been executed otherwise than by deed and so a validly entered into contract by electronic means will satisfy this requirement.

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<sup>1</sup> <https://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/>

20. In order to validly execute contracts virtually, we have set out below the process that should be followed depending on the document being entered into. These processes should be strictly adhered to in order to avoid all challenges relating to the validity of the contracts.

**Deeds and real estate contracts** (also applicable for guarantees and contracts)

21. The formal requirements for deeds will still be required to meet, i.e. be in writing, express on its face that it is a deed and the formalities re signatures be adhered to re attestation by a witness. For companies which are required to execute deeds using the signatures of authorised officers, electronic signatures will satisfy the requirements.

22. The process of executing a valid deed virtually is as follows:

- The final version of the deed is circulated to all parties by the lawyer with master control (“master lawyer”).
- The signature page is printed by each party, signed in accordance with the formal requirements, scanned and emailed back to the master lawyer. It is important to note that both the signature page AND the final form version of the deed must be emailed back to the master lawyer in the SAME email. This is to demonstrate the intent of the party in entering into that specific form and wording of the deed.
- The master lawyer will then compile the signature pages into a single complete deed, email it back to the parties who then confirm it has been delivered.

23. Some contracts (especially those relating to land) are required to be executed using wet ink signatures, including:

- transfers
- leases

- charges
- any other deeds that have to be registered at the Land Registry or Companies Registry

24. The primary reason for this is that these are documents which are required to be registered and a wet ink original is required for registration purposes. To that end, parties should post the wet ink signature pages to the master lawyer so that a full original document can be created.

### **Contracts other than deeds**

25. As a general rule, the contract should contain express wording allowing for its execution by counterpart.

- **Option 1** – follow the same process as above for deeds, save that confirmation of delivery is not required.
- **Option 2** – where parties are still negotiating terms, parties sign blank signature pages which are held by the master lawyer on trust till the final form document is agreed. Once in final form, a compiled document will be circulated to all parties who confirm that their signature page may be attached to the final form document.

### **Conclusion**

26. It is very likely that courts will be sympathetic to the practical difficulties posed by the restrictions currently in place. Directions are likely to be welcomed by the court and the parties alike to further the overriding objective to keep litigation moving efficiently. In relation to executing contracts virtually, however, these procedures have been in place for quite some time and so it is likely that the courts will require strict adherence to them in order to find virtually executed contracts valid and binding on parties.

**ELIZABETH ENGLAND**  
**TIERNAN FITZGIBBON**